

# THE MONITOR

By Bob Brewin

## CBS Takes On Congress and the CIA

STAT Add yet another front to the Westmoreland/CBS libel war—some time in the next several weeks attorneys for CBS plan to take on the House of Representatives, the Central Intelligence Agency, and former CIA director Richard Helms in U.S. Appeals Court in Washington, D.C.

This case stems from separate actions CBS has been pursuing in U.S. District Court to obtain from the CIA and the House documents that the network contends are germane to its Westmoreland defense, as well as a suit which sought to compel Helms to be videotaped during his deposition for the Westmoreland trial.

The appeals court case is rife with constitutional issues, including an assault by CBS on the House's rights under Article 1, Section 6, Clause 1 of the Constitution, which generally prevents court examination or subpoena of congressional speech, records, and deliberations.

It also focuses on the delicate balance of CBS's right to exercise its free speech guaranteed under the First Amendment versus Helms's right to privacy as an individual under the First and Fourth Amendments. Finally, the Washington appeals court must consider whether the "deliberative process privilege" found in the common law precludes the CIA from turning over to CBS a top secret history of the Vietnam War, called the "Palmer Report," and the notes of morning meetings Helms held while he was CIA director.

CBS and the general are already fighting the libel case on three other fronts: before the jury in district court on Foley Square in New York, in arguments before Judge Pierre Leval on the introduction of outtakes from the documentary, and in a wide publicity war. CBS lost the first round in Washington in April when District Court Judge Thomas Jackson quashed its subpoena for documents from the House, and in a separate order denied it access to the CIA documents. The judge also barred CBS from videotaping Helms.

In its appeal, CBS's Westmoreland defense team, headed by David Boies of Cravath, Swaine & Moore, argued that the House and CIA documents are essential to its case in New York. General Westmoreland claims CBS libeled him in its January 1982 documentary, *The Uncounted Enemy: A Vietnam Deception*, by saying that he engaged in a "conscious conspiracy" to hide the true strength of enemy forces the U.S. faced in Vietnam.

In the House/CIA suit, Cravath is arguing that lack of access to the "Palmer Report," minutes of Helms's morning meetings, and CIA documents given to the House Select Committee on Intelligence (the "Pike Committee") in 1975 "severely handicaps CBS's ability to respond to plaintiff's claims [in the New York case]. . . ."

A key issue in the libel trial is the integrity of a "compromise" reached between the CIA and Westmoreland's Vietnam command on the number of enemy listed in a Special National Intelligence Estimate (SNIE 14:3-67). In essence this March 1967 document created two classes of enemy: regular North Vietnamese and VC forces, and another category consisting of various types of irregular forces, referred to by General Westmoreland on the stand as old men, women, and young boys.

Before that compromise was reached, some CIA analysts had argued for inclusion of irregulars in the enemy order of battle along with regulars, which would have drastically increased the numbers of the enemy the U.S. faced (at least on paper). CBS claims in its appeal that:

"The compromise reflected in SNIE 14:3-67 was in fact an almost complete abandonment by the CIA of its own figures in favor of the military command's drastically lower estimates of enemy strength. Plaintiff claims that the military figures reflected in SNIE 14:3-67 represented a good faith position rather than a politically motivated position that plainly ignored the best available intelligence information. . . . The lack of access to contemporaneous CIA documents such

as the minutes and the CIA documents provided for the Pike Committee's examination severely handicaps CBS's ability to respond to plaintiff's claims concerning the CIA's position."

CBS argued that one reason it is seeking to invade the House's privileged sanctity is that records leaked from the Pike

### VIETNAM ON TRIAL



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#### Helms: No video, please

Committee to the press (including *The Village Voice*, which published "The Pike Papers" in a special February 16, 1976, supplement) back up the documentary's contentions. The report said, in part: "The validity of most of the numbers was significantly dubious. Unfortunately they were relied on for optimistic presentations. . . . General Westmoreland used such figures to support his contentions that the enemy's 'guerrilla force is declining at a steady rate.'"

The network maintains that the order barring it from obtaining the House and CIA papers is something of a legal black hole. It said in its pleading that while Westmoreland cast himself in the libel suit not as a former high government official but as a "private litigant seeking to protect purely personal interests . . . he also enjoys the protection of a variety of privileges and immunities enjoyed by government and government officials."

CBS also charged that the withholding of the papers undermined its "ability to defend itself... to a degree sufficient to violate due process: *CBS cannot fairly be required to pay damages for criticism of a high government official's conduct if information important to its defense is withheld pursuant to governmental exercise of uniquely governmental privileges.*" (Emphasis added.)

CBS claims it needs to videotape Helms's deposition because it has reasons to question his veracity. The network told the appeals court that after Helms pleaded "no contest" to a 1977 misdemeanor charge of failing to testify fully and accurately to a Senate committee in 1973, he then boasted to the press that he did not feel "disgraced" at all, that in fact he would "wear his conviction like a badge of honor." CBS argued that "... Helms' record indicated that he may believe he has the right, indeed the duty, to disassemble, if a full and accurate answer would reveal matters that he believes it undesirable to reveal... thus a videotaped record of his deposition was necessary to ensure an accurate and trustworthy record."

Despite these arguments, CBS may face a tough time in the appeals court. In district court, the clerk of the House invoked its absolute inviolability under the speech-and-debate clause of the Constitution, and backed it up with Supreme Court citations. The CIA said the deliberative privileges found in common law and various national security statutes give it the right to keep its documents away from CBS.

John Kester, attorney for Helms, claims the First and Fourth Amendment privacy rights of any individual—including a public official—outweigh CBS's free speech rights under the First Amendment. Whatever the outcome, this offshoot of *Westmoreland v. CBS* is the kind of case which should serve as fodder for civil libertarians and strict constitutionalists for years to come.

### Short Rounds

... **Brooks Brothers, Watch Out:** David Boies, the Cravath partner heading the CBS defense, proves you can be a successful Wall Street lawyer without donning the obligatory Brooks Brothers pinstripes. Where does Boies get his suits? Sears. In fact, Boies is an unabashed Sears fan. "I wear Sears shoes, I have a Sears garden tractor, I have two couches from Sears, I have a washer and a refrigerator from them. I like Sears so much that I just couldn't understand it when Koch was going around muttering

about guys in brown Sears suits a few years back..." Boies attributes this fondness for Sears to his upbringing in small-town Illinois where Sears was a big deal. Oh, yeah. Boies buys his casual clothes at *K-Mart*!... **Casually Colloquial:** Judge Leval's casual use of the language provides a needed break at a trial marked by obfuscation, military acronyms, and arcane governmentese. Interrupting a discussion between the lawyers on whether a witness could be deposed depending on where he lived, Leval interjected, "Where does he hang out?" Leval also has his own unique sardonic style, showing a predilection for bow ties in quite unjudgelike patterns and colors. My favorite: the pink number with the blue polka-dots worn with a pink shirt. My, we've just had two fashion notes about men. The feminists should be pleased. ... **The Original TV Prez:** In outtakes of *Westmoreland's* interview with CBS correspondent Mike Wallace, shown in court, the general kept trying to impress on Wallace how obsessed Lyndon Johnson was with the TV coverage of the war. When he told Wallace that LBJ "even had a TV set in his bathroom," the packed courtroom erupted in laughter. ■